INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	8
Conclusion	9

CITATIONS

Cases:

Soderberg et al, v. *S. Birch & Sons Construction Co.*, No. 359, this Term 2, 4, 5, 8

Statutes:

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060 *et seq.*, 29 U. S. C. 201 *et seq.*, Sec. 7 2

765813—47

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 358

F. J. ENGLERT, PETITIONER

v.

S. BIRCH & SONS CONSTRUCTION CO. AND MORRISON-KNUDSEN CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the Western District of Washington, Northern Division (R. 108–111) is not officially reported. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 119–127) is reported at 163 F. 2d 34.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Ninth Circuit was entered on June 27, 1947 (R. 127–128). The petition for certiorari was filed on September 22, 1947. The jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a warehouse clerk, who was employed by a Government contractor engaged in the construction of fortifications on an Aleutian island base, and whose duties consisted of checking the receipt of goods consigned to the contractor at their final destination and after the termination of their continuity of movement, is "engaged in commerce" within the meaning of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent part of the Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U. S. C. 201, *et seq.*) provides as follows:

> SEC. 7 (a). No employer shall, * * * employ any of his employees who is engaged in commerce or in the production of goods for commerce * * *
>
> (3) for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

The instant action, a companion case to *Soderberg, et al.* v. *S. Birch & Sons Construction Co.*

et al., No. 359, this Term, was originally brought by petitioner on his own behalf and, as assignee of their causes of action, on behalf of three former fellow employees of respondents, for the recovery of overtime compensation, liquidated damages, and counsel fees under the provisions of the Fair Labor Standards Act, *supra* (R. 2–13). The complaint was in four counts (R. 2–13). It alleged that respondents[1] were engaged in the purchasing and using, selling and furnishing of materials, equipment and supplies in interstate commerce; that the duties of petitioner and his assignors constituted an essential part of the handling and the buying, selling and transporting of respondents' goods in interstate commerce; that the performance of such duties constituted "engaging in commerce" within the meaning of the Fair Labor Standards Act; and that respondents had failed to compensate them for hours worked in excess of 40 hours per week as provided for in the Act (R. 3–6). The trial court found that only one of the claimants had been "engaged in commerce" within the meaning of the Act (R. 23–25) and dismissed counts 1, 2 and 3 (R. 26–28).[2] On appeal, the court below af-

[1] Respondents were joint venturers (R. 104). S. Birch & Sons Construction Co. is a Montana corporation and Morrison-Knudsen Co. is a Delaware corporation; both corporations are qualified to do business in, and maintain an office in, the State of Washington (R. 23–24).

[2] The trial court found that claimant Bjorgum in count 4, shown to be respondents' Assistant Personnel Manager, had

firmed (R. 127–128). The petition herein was filed by petitioner on behalf of claimant Stuart in count two (Pet. 2; R. 7–9).

The facts are briefly summarized as follows:

As we have indicated in the *Soderberg* case, *supra,* (Br. in Op., pp. 4–9) the United States, as a defense measure, undertook to fortify certain of the Aleutian islands [3] and to improve existing

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been engaged in interstate commerce, since he was regularly and substantially working in the movement of employees in interstate commerce (R. 110). Accordingly, it held him entitled to overtime compensation together with an additional equal amount as liquidated damages plus counsel fees (R. 24–25). On appeal, the Government did not contest the correctness of this ruling. The claims of petitioner, who was shown to be the manager of the company store (R. 108), and of Rude, manager of the lodging and feeding service furnished respondents' employees (R. 109), are not involved in this petition. The claim of Stuart, which is the only claim involved in the instant petition, was dismissed on the ground that respondents' activity was not connected with getting material to the job site, nor was Stuart so concerned. Rather, the latter was dealing with materials which were moved from the storage place on the island to the particular site where the structure was being built on the same island (R. 109). Thus the court concluded, "it seems clear * * * that as to Mr. Stewart [sic] no claim has been established that his services were connected with or in any substantial way advanced the movement of materials in interstate commerce" (R. 109).

[3] The name of the island involved in the instant action has been withheld at the request of the Army (R. 40). Respondents were engaged in construction work at the base under contract with the United States (R. 23). Because the United States is or may become liable under the terms of the contract, defense of this action was undertaken by the Department of Justice at the request of the War Department.

structures located thereon (R. 17, 23, 122). Pursuant to this program, the Government entered into a contract with respondents whereby the latter agreed to do asphaltic concrete and asphaltic seal coat work on one of those islands (R. 17, 23, 122).[4] The claimant involved in the instant action was employed by respondents in the capacity of clerk in the company warehouse (R. 43, 87, see n. 2, *supra,* pp. 3–4), located at the job site from June 23, 1944, to February 17, 1945 (R. 21).

It was stipulated by the parties that the procurement of approximately 90% of the materials, equipment and supplies used in the overall construction of the project, was effected directly by the Government from various manufacturers, shipped to the project by Government-furnished transportation, unloaded from the vessels by military personnel, and delivered to the warehouses, asphalt plants or shops of the various contractors by Government-owned trucks operated by military personnel (R. 18, 123). The supplies procured by respondents herein[5] were procured by

[4] The contract specified that respondents' work was to be performed under the direction of the Army Engineers; that respondents furnish the necessary labor, and perform engineering, laboratory and inspection work; and that respondents furnish crews to operate mess halls and quarters (R. 18, 122–123). The building equipment and rations were furnished by the Government (R. 18, 123).

[5] Of the total tonnage of approximately 270,000,000 pounds, approximately 6 per cent was procured by respondents (R. 18, 123). See *Soderberg et al.* v. *S. Birch & Sons*

their Seattle, Washington office from various vendors throughout the United States (R. 18, 123). The merchandise was delivered in Seattle to crating and processing plants where it was processed for overseas shipment and transshipped by the Government to the Resident Engineer, U. S. Army, in the island in question (R. 19, 124).

Upon arrival of material and supplies at the island, the entire handling of all cargo was accomplished by Army personnel without regard to type or use (R. 19, 124). After discharge from the incoming vessels, the equipment, material, and goods were stock-piled at an Army sorting or classification yard, maintained and operated by the Army under the supervision of the Resident Engineer where it was guarded, sorted and distributed to the various Government contractors by military personnel (R. 19–20, 124).[6] From the sorting yard, the goods were loaded on trucks and taken to their ultimate storage destination (R. 20, 88–89, 124). Respondents' employees took charge of respondents' supplies at the time they were moved to respondents' warehouse or

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Construction Co., No. 359, this Term, Br. in Op., pp. 5–6. In the purchasing of all material, supplies or goods, title of the items passed directly to the Government from the vendor (R. 18–19, 123).

[6] Each contractor had an expediter on hand whose duties were to claim the goods intended for his company's project (R. 20, 88, 124).

other placement designated by respondents' supervisory employees (R. 20, 124).

After the goods were received at the various warehouses, the cases were opened and the merchandise checked for quantity (R. 89). As warehouse clerk (R. 43), it was claimant Stuart's[7] duty to check the items received against the respondents' purchase orders and ships' manifests (R. 87, 90).[8] He was not assigned duties at the classification yard or "loading platform" except in emergencies (R. 95, 101).[9] Claimant Stuart was classified as a Class "B" employee and was paid a fixed salary of $75 per week (R. 40–41).[10]

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[7] Petitioner states that, under his contract with respondents, he was to procure supplies for use in building the improvements and for the operation of a resale commissary, to furnish labor from the United States, and to operate mess halls and quarters (Pet. 3). This assertion is not supported by the record before this Court. Moreover, it is immaterial, since the petition herein seeks review only on behalf of claimant Stuart in Cause of Action No. 2 (Pet. 2).

[8] In addition, Claimant Stuart prepared "check lists" for the material checkers who were assigned duties at the Classification Yard or unloading dock (R. 87, 101–102). These lists were prepared from copies of the ships' manifests (R. 102).

[9] Witness Lloyd Finn, respondents' office manager, testified that occasionally, when several vessels were discharging at the same time, one or two men from the warehouse would go down to the classification yard or "loading platform" in in order to facilitate the movement of goods through there (R. 101).

[10] Class "B" employees were employed under a contract by the terms of which they were supposed to work as many hours as the contractor required them without extra compensation

ARGUMENT

The question presented by this case is substantially the same as that presented by the companion case, *Soderberg et al.* v. *S. Birch & Sons Construction Co. et al.*, No. 359, this Term, and the attention of this Court is respectfully invited to the brief in opposition filed by the Government therein. For the reasons there set forth (pp. 12–17), we submit that Stuart was not within the coverage of the Act and that the judgment below is correct.

CONCLUSION

We respectfully submit that the petition for certiorari should be denied.

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NOVEMBER 1947.

(R. 40–41). Claimant Stuart worked an average 60 hours per week. For this he was paid for 48 hours' work, straight time (R. 38–39). In addition, he was paid double time for Sunday work (R. 39).

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